

The Delaware Department of Transportation (DelDOT) DBE Program offers the following comments on the proposed regulatory changes:

DEPT OF TRANSPORTATION
DOCKETS

1. Counting Credit for Item Obtained by DBEs from Non-DBE Sources

DelDOT asserts leaving the language unchanged as the best of the options offered. Either of the other alternative options would create significantly increased administrative and monitoring workloads for state agency project management and DBE Program personnel.

2. Contract Unbundling

DelDOT contends that the unbundling of contracts, while desirable and potentially of identifiable and quantifiable benefit to DBEs, would prove to not be feasible to implement. Unbundling would significantly increase administrative costs to the various state agencies in the advertising and administering of the projects through the development phases. The savings in actual dollars and in personnel hours expended in project and contract development, where contracts are merged into large contracts, are even more important to our state agency and probably others similarly experiencing fiscal crises.

3. Revised DBE Certification Application and Personal Net Worth Statement

It is widely held and regularly communicated by prospective DBEs that the certification application is too complex, cumbersome, and difficult to complete. Adding to the personal net worth information required or expanding the instructions to deal with varied scenarios would not improve the application process. A better means to address the various issues presented in relation to personal net worth circumstances is to develop and widely disseminate detailed follow-up questions for DBE Program professionals to utilize in interviews.

Utilizing the interview process is a preferable means to get good, solid information in response to potentially problematic personal net worth situations. This would place more responsibility on DBE Program professionals to recognize problematic situations, assess the information initially provided and ask appropriate follow-up questions. Solicitation should be made for interview "best practices" from various agencies to compile and share nationally as a certification tool.

4. Program Oversight

DelDOT supports the proposed amendment language which would strengthen state agency self-analysis and review. Currently there is little guidance embodied in the regulations for state agencies to use in reviewing their own DBE Programs. Inclusion of such guidance would permit DelDOT and other similar agencies to more effectively

police the participants in their respective DBE Programs and root out and eliminate fraud and collusion.

5. Facilitating Interstate Certification

The issue of reciprocity of certification has long been a problem. The inconsistent level of review on certification applications and the divergent results reached in different states on applications from the same firm does not, in practice, support blanket reciprocal acceptance of another state's certification determinations. There is another approach to address the problems presented – a federalized approach. Federalizing the certification process, to an extent, would imbue the certified status for reciprocity with integrity and confidence in the evaluation of such candidates initially.

The Conference of Minority Transportation Officials (COMTO) requested DelDOT to provide information on this subject. Below is the response, incorporating a suggested methodology provided on the issue of nationwide certification reciprocity.

1. *What sort of national certification?*

a. The certification is required to be compliant with 49 CFR Part 26 to include initial certification in the home state of the applicant.

2. *One that has basic minimum standards which would serve as baseline for all states with federally funded projects. That is, what models do you have in mind for a national certification system?*

a. Ideally, a national DBE (HUB) certification system would be unique to the requirements of the federal regulations. There should be a standard review form, encompassing all of the various situations and contingencies which need to be evaluated in determining eligibility. This standard review form would also be utilized by the individual home states in assessing the eligibility of applicants. This would insure consistency in the determinations arising from the application process.

3. *As you envision it, how would such a system work?*

a. A firm would need to be certified in its home state, as is required now. Such determinations would be made fully utilizing the provisions of 49 CFR 26 and reflect application of consistent standards as noted above.

b. A firm seeking to market its products and services as a DBE to participants on federal aid projects in a state other than its home state would, within three years of the original certification date, apply for national certification.

c. The national certification application would be separate and distinct from the standard certification application. It will be a short form (no more than one page) that requires a firm to certify specific details such

as home state certification status, date certified, and justification for the necessity for national certification – specifically what business expansion is sought and where the DBE anticipates working or providing services.

d. If a firm has been certified for more than three years the home state will be required to recertify the firm. The recertification process in essence would be as comprehensive as the initial certification process, thereby giving the national certification review office sufficient information and documentation upon which to base the national certification determination.

e. Once an application for national certification is submitted, a central office would request support documentation from the home state. A desk audit is performed to be sure that the home state followed the requirements of 49 CFR Part 26. In the event that the regulations have not been satisfied or the determination has not been based on full consideration of all relevant facts, information, circumstances and contingencies, the national certification office would request the home state to revisit the application to bring the file into compliance or begin the process to deem the firm ineligible to participate.

f. If the regulations have been satisfied, the firm receives national certification for the region identified in the national application as being appropriate for that specific applicant up to the entire country.

g. The national certification would be for a term of three years unless otherwise notified by the home state of a firm's eligibility status.

4. *Who would be responsible for what tasks?*

a. The applicant firm would still be required to apply in its home state and then for national certification.

b. The home state would still be required to perform the initial certification, utilizing a standard review form in assessing the eligibility of applicants. This would insure consistency in the determinations arising from the application process.

c. The home state would perform all annual and three reviews. The three year review would be a complete recertification process.

d. A designated national unit would perform the desk audits and render determinations for national certification.

e. The national certification unit would request updates every three years on each nationally certified firm.

5. *How would the system meet potential challenges (e.g., forum shopping, resolution of disagreements, maintaining an accurate and updated data base)?*

a. No forum shopping as the home state still has responsibility for certifying applicants in its state. The national certification unit acts similar

to an appeal in that they confirm that the home state followed the requirements of 49 CFR Part 26. This would also provide a monitoring of home state DBE certification practices and allow for a national assessment and improvement as needed.

b. There would not be a need for dispute resolution as the national certification unit is confirming that the home state followed the requirements of 49 CFR Part 26. The inter-state disputes would be eliminated.

c. There would be a national database that is updated and maintained by each of the home states. As national certification is granted, the national unit will notify the home state, which would then be responsible for input to the national database.

d. The database could be used as a sole source for all certification data with a specific designation of national certification only for those firms that have completed the process outlined above.

e. The national certification unit will be automatically notified via email of all changes to a nationally certified firm's profile.

f. Not all firms will be certified for the entire country. Regions will be developed. Only those firms that can demonstrate realistic deliverables to specific regions will be considered a certified firm in those regions. For example, a construction firm in California may not be able to realistically perform its services in Delaware; therefore it will not be able to designate the entire country as its area of interest. That firm will demonstrate a realistic region or regions that it has the capability to successfully perform.

g. Challenges to a firm's eligibility for national certification will be submitted to the national certification unit for investigation, similar to that of an appeals process.

6. *What would the resource requirements be?*

a. Interactive database with input access granted solely to each home state for actions within their jurisdiction and review capability for all others.

b. Personnel on the national level to perform the various desk audits and process investigative functions.

c. The national certification unit could be centrally located or regionally located.

6. **Termination for Convenience and Substitution**

DelDOT supports the inclusion of language in §26.53 to require written approval and a finding of good cause prior to a prime contractor terminating a DBE firm. We have experienced a variety of situations involving substitutions that had adverse consequences

for the DBE firm involved. Strengthening the language in the regulations to include scenarios where the prime did not perform the work would allow more state agency DBE Program review and involvement. Such increased involvement should improve oversight and insure protection for the DBE firm offered to meet the established goal.

With respect to change order additions of work to a contract, DelDOT supports amending the regulatory language to require the prime contractor to offer the increased work items to the DBE firm engaged to meet the DBE goal. It is our opinion that routinely significant dollars are lost or not offered to DBE firms performing the type of work increased by change orders because the prime contractors arbitrarily choose to perform the additional work. Regulatory language requiring DBE firms be afforded the opportunity to perform and get paid for the additional work should be included would serve the spirit of the DBE Program and benefit the DBE firms.